A

SABAH MEDICAL CENTRE SDN BHD & ANOR

v.

HOSPITALIA ACTIVHEALTH (L) GMBH & ORS

B

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LINTON ALBERT J
[SUIT NO: 22-193 OF 2006]
9 MARCH 2007

C ***CIVIL PROCEDURE:*** *Injunction - Interim injunction - Application for stay of arbitration proceedings pending determination of suit - Delay in filing of application - Whether unexplained and inordinate - Whether prejudicial to opposite party*

D The 1st plaintiff, the owner of a hospital, engaged the 1st defendant under a Hospital Management Agreement ('HMA') to operate the hospital in return for payment of various charges and fees. The 2nd plaintiff owned the majority shareholding in the 1st plaintiff. A dispute arose between the parties when the 1st plaintiff refused to pay the 1st defendant an incentive fee of about RM17 E million that the 1st defendant claimed to be entitled under the HMA. Consequently, the 1st defendant terminated the HMA and claimed an additional termination fee of RM1.5 million. The dispute was referred to arbitration pursuant to an arbitration clause under the HMA. During the course of the arbitration proceedings, the F 1st plaintiff discovered that there was a basis to include the plea of fraud in its defence and counterclaim and accordingly applied for an adjournment to re-amend the defence and counterclaim. The arbitrator allowed the re-amendment. However, the arbitration G proceedings which was fixed for continuation on 1 November 2006 did not take place because the plaintiffs obtained an *ex parte* injunction for stay of the arbitration proceedings pending determination of a suit filed by the plaintiffs against the defendants in court. In that suit, the plaintiffs alleged fraud and sought various declaratory reliefs against the defendants and in particular H challenged the arbitrator's jurisdiction to adjudicate on the dispute between the 1st plaintiff and the 1st defendant. This was the *inter partes* hearing of the application for the said injunction.

I

Held (dismissing the application):

(1) It is clear from the authorities cited that each case has to be considered according to its own particular circumstances. The question whether to grant or refuse an application for interim injunction is not determined solely on the length of the delay. However, where there has undoubtedly been a delay that has prejudiced the other party, the delay would, in such a situation, be fatal to the application unless there is a satisfactory explanation for the delay. (para 5)

(2) The element of fraud was discovered from the testimony of one of the witnesses at the arbitration proceedings on 5 July 2006. The application for the *ex parte* injunction was filed some five months later, ie, on 30 November 2006. During that period, the 1st defendant went through the trouble of making preparations to counter the 1st plaintiff's re-amended defence and counterclaim to plead fraud. The 1st defendant also procured the attendance of witnesses from far parts of the world for the continuation of the arbitration proceedings on 1 November 2006. Further, the 1st plaintiff put the 1st defendant and the arbitrator through a futile telephone conference in the late afternoon of 30 October 2006 to finalise procedural and administrative issues for the continuation of the arbitration proceedings. This was a complete farce because by then the 1st plaintiff had obtained the injunctive reliefs. The *ex parte* injunction was intimated to the 1st defendant and the arbitrator on 31 October 2006 that led to the abrupt discontinuation of the arbitration proceedings. Such was the measure of the plaintiff's delay. This was compounded by the unsatisfactory explanation given by the 1st plaintiff that the discharge of one of its counsel for the arbitration proceedings further led to the delay. (para 5)

Case(s) referred to:

Evercrisp Snack Products (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd [1980] 2 MLJ 297 ***(refd)***

Hj Wan Habib Syed Mahmud v. Datuk Patinggi Hj Abdul Taib Mahmud & Anor [1986] 2 MLJ 199 ***(refd)***

Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors [1997] 5 CLJ 307 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 67, 132C

For the plaintiffs - Mary Lee Chung Ching; M/s Lee & Kong
For the defendants - Alex Decena (Zulaiha Chiew and Christopher Thian with him); M/s Zahirshah & Zulaiha Chiew

Reported by Usha Thiagarajah

JUDGMENT

Linton Albert J:

[1] The 1st plaintiff was the owner of a hospital at Kota Kinabalu called the Sabah Medical Centre (the Hospital). By a Hospital Management Agreement (HMA) dated 18 December 2000, the 1st plaintiff engaged the 1st defendant to operate the Hospital in return for which the 1st plaintiff was to pay the 1st defendant various charges and fees. A dispute arose between the 1st plaintiff and the 1st defendant when the 1st plaintiff refused to pay an incentive fee amounting to RM17,494,719 which the 1st defendant claimed to be entitled to under the HMA. The incentive fee represented twenty percent of the proceeds of sale of the 1st plaintiff's assets. Consequently, the 1st defendant terminated the HMA. The dispute between the 1st plaintiff and the 1st defendant was referred to a single arbitrator under the Rules of the Kuala Lumpur Regional Centre for Arbitration pursuant to the HMA. The 1st defendant's claim was for the incentive fee plus termination fee of RM1,500,000 and other miscellaneous charges. The 1st plaintiff denied liability for those claims and counterclaimed for damages for breach and unlawful termination of the HMA. The dispute was referred to arbitration in early 2005. The 1st plaintiff amended its defence and counterclaim to include pleas of mistake and misrepresentation in June, 2006. The arbitration proceedings commenced on 3 July 2006 and continued on various dates in July 2006 at the conclusion of which four witnesses had already testified and cross-examined. The 1st plaintiff's application to re-amend its defence and counterclaim to add the plea of fraud was allowed by the arbitrator on 28 September 2006. The arbitration proceedings which was fixed for continuation on 1 November 2006 never took

place because on 30 October 2006 the plaintiffs obtained *ex parte* orders for stay of the arbitration proceedings and restraining the 1st defendant from participating in the arbitration proceedings. The *ex parte* interim orders were dissolved after an *inter partes* hearing. I now give the reasons.

[2] The action upon which the *ex parte* interim orders were sought and obtained was commenced by the 1st plaintiff and the 2nd plaintiff, barely two days before the scheduled continuation of the arbitration proceedings on 1 November 2006. It was contended for the plaintiffs that the execution of the HMA was obtained by fraud ascribed to the defendants. There was also the allegation of conspiracy to defraud by two or more of the defendants which only became clear to the plaintiffs after hearing the testimony of one of the witnesses at the arbitration proceedings, particularly dealings made in contravention of s. 132C and 67 of the Companies Act 1965. It was therefore, argued that these matters raised in the action concerned issues which were beyond the ambit of the arbitration clause in the HMA or were outside the jurisdiction of the arbitrator in the arbitration proceedings. By way of illustration, it was pointed out that the 2nd, 3rd and 4th defendants were not parties to the HMA and could not conceivably be compelled to submit to the arbitration. There was also the argument relating to the avoidance of multiplicity of suits in that the court would be the more appropriate forum to try and determine the disparate issues between all the parties to the action, something which could not be achieved in the arbitration proceedings bearing in mind the limited jurisdiction of the arbitrator.

[3] In its application to have the *ex parte* injunction dissolved, the 1st defendant relied on several grounds, one of which was to the effect that there was unexplained and inordinate delay on the part of the 1st plaintiff. The law on this aspect of injunctions is well settled. I shall begin by referring to some of the authorities. In *Haji Wan Habib Syed Mahmud v. Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 199, an authority cited by learned counsel for 1st defendant, Abu Mansor, J said:

> The delay of nearly two months on the applicant's part in bringing this action I hold to be fatal ...

In *R. v. Senate of University of Aston (supra)*, Blain J. in refusing the exercise of a discretionary power affected by delay said:

> This court does not lightly exercise its discretion not only is real injustice a necessary ingredient before any application is granted, but it should, in my view be granted only where diligence is shown by an applicant in real need of remedy.

[4] Learned counsel for the 1st plaintiff, however, relied on *Larut Consolidated Bhd. & Anor v. Khoo Ee Bee & Ors*. [1997] 5 CLJ 307 where Kamalanathan Ratnam, JC had this to say:

> ... The mere act of delay, even if there was, is not *per se* a factor which militates against the grant of an injunction. The maxim 'delay defeats equity' must not be applied with the blindfold that symbolises justice. The facts of each case must be looked into. I hold that for delay to operate as a bar, it is essential that it should prejudice the defendants. From the facts of this case, in no way whatsoever were the defendants disadvantaged by the delay. In fact, the delay in this case had acted to the defendants' benefit since they have had the use of the money for the length of the delay ... .

[5] It is clear from the authorities cited that each case has to be considered according to its own particular circumstances: the question whether to grant or refuse an application for interim injunction is not determined solely on the length of the delay; but where there has undoubtedly been a delay which has prejudiced the other party, the delay would, in such a situation, be fatal to the application unless there was a satisfactory explanation for the delay. (See *Evercrisp Snack Products (M) Sdn. Bhd. & Anor* v. *Sweeties Food Industries Sdn. Bhd.* [1980] 2 MLJ 297). Here, the element of fraud which added complexity to the 1st plaintiff's case allegedly sufficient to take the matter out of the jurisdiction of the arbitrator was discovered from the testimony of one of the witnesses at the arbitration proceeding on 5 July 2006. The application was filed on 30 November 2006, some five months later. During that period the 1st defendant had gone through the trouble of having to make preparations to counter the 1st plaintiff's re-amended defence and counterclaim made on 17 July, 2006 to plead fraud, and on that basis procured the attendance of witnesses from far-flung parts of the world for the continuation of the arbitration proceedings fixed to begin on 1 November

2006. To cap it all, the 1st plaintiff put the 1st defendant and the arbitrator through a futile telephone conference in the late afternoon of 30 October 2006 to finalise procedural and administrative issues for the continuation of the arbitration proceedings set for 1 November 2006 which was a complete farce because by then the 1st plaintiff would have indubitably obtained the injunctive reliefs restraining the 1st defendant from proceeding further with the arbitration proceedings bearing in mind that the *ex parte* application was fixed for hearing at 11am. The *ex parte* injunction was intimated to the 1st defendant and the arbitrator on 31 October 2006, which spelled the abrupt discontinuation of the arbitration proceedings. Such was the measure of the 1st plaintiff's delay compounded as it was by the farcical coincidents, which the 1st plaintiff attempted to explain away by stating that one of its counsel for the arbitration proceedings had discharged himself on 16 October 2006 and was therefore "compelled to look for new solicitors who in turn needed time to study the issues of the case". That proposition was, in the circumstances, so ridiculously untenable that it would be charitable to is even call it an explanation; it certainly fell far short of being satisfactory. Coupled with the prejudice suffered by the 1st defendant, I had on that ground alone, allowed the 1st defendant's application to dissolve the *ex parte* order obtained by the 1st plaintiff on 30 October 2006 and accordingly so ordered.